

1 **FEDERAL ELECTION COMMISSION**
2 **999 E Street, N.W.**
3 **Washington, D.C. 20463**

4
5 **FIRST GENERAL COUNSEL'S REPORT**

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7 MUR: 6729
8 DATE COMPLAINT FILED: 04/03/2013
9 DATE OF NOTIFICATION: 04/10/2013
10 DATE ACTIVATED: 06/18/2013

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12 EXPIRATION OF SOL: 10/01/2017
13 ELECTION CYCLE: 2012

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15 **COMPLAINANT:** Citizens for Responsibility and Ethics
16 in Washington

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18 **RESPONDENT:** Checks and Balances for Economic Growth

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20 **RELEVANT STATUTES:** 2 U.S.C. § 434(f)(1), (3)
21 2 U.S.C. § 434(g)(2)(A)
22 2 U.S.C. § 441d(d)(2)
23 11 C.F.R. § 100.16
24 11 C.F.R. § 100.22(a), (b)
25 11 C.F.R. § 100.29(a)
26 11 C.F.R. § 110.11(a)-(b), (c)(4)
27 11 C.F.R. § 100.155

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29 **INTERNAL REPORTS CHECKED:** FEC Disclosure Reports

30 **FEDERAL AGENCIES CHECKED:** FCC Website

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32 **I. INTRODUCTION**

33 The Complaint in this matter alleges that Checks and Balances for Economic Growth
34 ("Checks and Balances"), a section 501(c)(4) organization based in Washington, D.C.,
35 knowingly and willfully violated the Federal Election Campaign Act of 1971, as amended
36 (the "Act"). According to the Complaint, Checks and Balances failed to file disclosure
37 reports in connection with two television advertisements that it broadcast in October 2012 and
38 failed to include disclaimers on the advertisements. In response, Checks and Balances
39 contends that the advertisements identified in the Complaint were shown only on the internet
40 and therefore did not trigger the reporting and disclaimer requirements of the Act. As set

1 forth in detail below, we recommend that the Commission find no reason to believe that
2 Checks and Balances violated 2 U.S.C. §§ 434(f)(1) and 441d(d)(2) by failing to file relevant
3 Commission reports or include appropriate disclaimers.

4 **II. FACTUAL AND LEGAL ANALYSIS**

5 **A. Factual Background**

6 The Complaint alleges that Checks and Balances spent at least \$896,290 to broadcast
7 television advertisements in October 2012. Compl. at 5. It provides copies of contracts,
8 invoices, and purchase orders relating to Checks and Balances' purchase of at least \$534,850
9 in air time between October 16 and October 29, 2012 that Ohio television stations submitted
10 to the FCC. *Id.*, Ex. F. The Complaint also provides two newspaper reports relating to Checks
11 and Balances' broadcasts. *See Alexander Burns, Anti-Obama Group Putting \$900k Into Ohio*
12 *(Updated)*, POLITICO (Oct. 15, 2012) (Compl., Ex. C) (reporting that "[President] Obama's
13 'about to get hit with almost a million dollars in negative ads in Ohio.'"); Neil W. McCabe,
14 *There is a 'War on Coal,'* HUMAN EVENTS (Oct. 19, 2012) (Compl., Ex. D) (describing
15 "significant statewide buy on Ohio"). Based on these materials, the Complaint asserts that
16 Checks and Balances broadcast two advertisements on television that expressly advocated the
17 defeat of President Obama and Sen. Sherrod Brown — "Why Would You Lie?" and "The
18 War On Coal: Sherrod Brown v. Ohio Coal Miners" ("War on Coal") — and alleges the
19 advertisements were aired during the October air time that Checks and Balances purchased.
20 *Id.* 3-6, 10-12.

21 The two advertisements the Complaint identifies contain the following content:

22 "Why Would You Lie?"

[Narrator] Absolute lies. That's what these coal miners had to say about Barack Obama's claim that they were forced to attend a campaign rally for Mitt Romney.

[On screen: Image of President Obama on the left. On the right, text reads, "ABSOLUTE LIES." Below this, text in a white box reads, "There are numerous false statements and absolute lies concerning our participation in the event. - Century Mine Employees

	10-11-2012" <i>Image of large group of coal miners walking up the street to a podium.]</i>
<i>[Coal miner] There is a war on coal, and we do want to protect our jobs.</i>	<i>[On screen: Image of coal miner speaking at podium surrounded by a large group of miners.]</i>
<i>[Narrator] In a letter, the miners make it clear no one was forced to attend the rally, no attendance records were taken, and there were no penalties for not attending.</i>	<i>[On screen: Footage of Mitt Romney at a rally standing at a podium surrounded by applauding coal miners. Sign on the podium reads,</i> <i>Mitt Romney.Com Coal Country Stands With Mitt</i> <i>Romney Ryan</i> <i>[part of sign bearing candidates' names is blurry]</i> <i>Text appears, "No one forced to attend." Image of Romney shaking hands with smiling coal miners appears. "No attendance taken," then "No penalties given" appears.]</i>
<i>[Coal miner] Why would you lie about the 500 working miners who have signed this letter.</i>	<i>[On screen: Image back to large group of coal miners at podium. At the bottom of the screen, "Paid for by Checks and Balances for Economic Growth" appears.]</i>

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"War On Coal"

<i>[Sherrod Brown] There is no war on coal. Period.</i>	<i>[On screen: Footage of Sherrod Brown speaking during 10/15/12 debate with opponent Josh Mandel].</i>
<i>[Narrator] Sherrod Brown is lying.</i>	<i>[On screen: "Sherrod Brown is not telling the truth" appears.]</i>
<i>[Coal Miner] There is a war on coal, and we do want to protect our jobs. President Obama and those like Sherrod Brown are job killers.</i>	<i>[On screen: Image of coal miner speaking at podium surrounded by a large group of men with text "Ohio Miners."]</i>
<i>[Narrator] Coal production is down 33% nationwide. Thousands are out of work. And incremental electricity costs are up 800%.</i>	<i>[On screen: Image of power plant with text, "204 Powerplants CLOSING." Image of people waiting in line with text, "Thousands Out of Work." Image of light bulb with text, "Electricity Costs Skyrocket."]</i>
<i>[Narrator] And Sherrod Brown votes with Obama 95% of the time.</i>	<i>[On screen: On the left, "Sherrod Brown votes with Obama 95% of the time." Image of Sherrod Brown on the right.]</i>
<i>[Coal miner] There is a war on coal, and we do want to protect our jobs. President Obama and those like Sherrod Brown are job killers.</i>	<i>[On screen: Image of coal miner speaking at podium surrounded by a large group of men with text "Ohio Miners." Picture of Sherrod Brown on the left. On the right, "STOP the war on coal." At the bottom of the screen "Paid for by Checks and Balances for Economic Growth" appears.]</i>

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1 The Complaint contends that “the television advertisements Checks and Balances
2 broadcast were either independent expenditures or electioneering communications” that
3 triggered reporting requirements under the Act and that by failing to file the appropriate
4 report, Checks and Balances violated 2 U.S.C. § 434(g) and/or 2 U.S.C. § 434(f)(1). Compl.
5 at 10-11. The Complaint further contends that these violations were knowing and willful,
6 asserting that Dan Perrin, president and director of Checks and Balances, is knowledgeable
7 about the Act’s reporting requirements for electioneering communications and independent
8 expenditures.¹ Compl. at 11-12. The Complaint also alleges that Checks and Balances failed
9 to include appropriate disclaimers on the two advertisements, a purported violation of
10 2 U.S.C. § 441d(d)(2). Compl. at 12.

11 Checks and Balances denied the allegations and provided a sworn declaration from its
12 President in support. *See* Resp. (Apr. 24, 2013); Dan Perrin Decl. (Apr. 24, 2013). As to the
13 two advertisements identified in the Complaint, the Response asserts that the allegations are
14 speculative and that the Complaint cites no evidence that they were in fact broadcast on
15 television, describing the newspaper reports as “false hearsay.” Resp. at 1. Checks and
16 Balances does not dispute that it produced the two advertisements. But it instead asserts that
17 those advertisements were run “only” on the internet. *Id.* at 1-2; Perrin Decl. ¶¶ 3, 4.
18 Therefore, Checks and Balances contends that the advertisements did not trigger reporting or
19 disclaimer requirements. Checks and Balances explains that the financial records provided
20 with the Complaint relate to a third advertisement, Resp. at 2, which was broadcast on
21 television but, according to Checks and Balances, did not trigger any reporting or disclaimer
22 requirements. *Id.*; Perrin Decl. ¶ 4.

¹ The Complaint notes that Perrin, in a previous role as president of the American Taxpayers Alliance (“ATA”), submitted comments to the Commission concerning electioneering communications in response to a Notice of Proposed Rulemaking and was aware of lawsuits and complaints filed against ATA regarding alleged violations of state campaign finance laws. Compl. at 6-7.

1 **B. Legal Analysis**

2 Checks and Balances contends that, because the two advertisements identified in the
3 Complaint were not broadcast on television, but were run only on the internet, no reporting or
4 disclaimer obligations applied.² Communications published solely on the internet need not be
5 reported as "electioneering communications" because the definition of that term captures only
6 "broadcast, cable, or satellite communication[s]." 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R.
7 § 100.29(a) (same).

8 As to independent expenditure reports, the Commission has promulgated a regulation
9 that exempts the costs associated with uncompensated "internet activity" by an individual or
10 group of individuals from the definitions of "contribution" and "expenditure." 11 C.F.R.
11 § 100.155. The language of that exemption focuses specifically on costs related to activities,
12 equipment, and services used to access or distribute information over the internet. *See id.*
13 § 100.155(b) (defining "internet activity" as including, but not limited to, "[s]ending or
14 forwarding electronic messages; providing a hyperlink or other direct access to another
15 person's website; blogging; creating maintaining or hosting a website; paying a nominal fee
16 for the use of another person's website; and any other form of communication distributed over
17 the Internet"); *id.* § 100.155(c) (defining covered "equipment and services" as including, but
18 not limited to, "[c]omputers, software, Internet domain names, Internet Service Providers
19 (ISP), and any other technology that is used to provide access to or use of the Internet").

20 Neither the regulation itself nor the Commission's accompanying explanation and

² News articles attached to the Complaint report that the advertisements identified in the Complaint were broadcast on television. *See* Compl., Ex. C-D. Further, Checks and Balances uploaded each advertisement to YouTube under the heading, "TV Ad." *See Why Would You Lie*, YOUTUBE (Oct. 10, 2012), <http://www.youtube.com/watch?v=9oE1O38-IIE>; *The War On Coal: Sherrod Brown vs. Ohio Coal Miners*, YOUTUBE (Oct. 19, 2012), <http://www.youtube.com/watch?v=PgPkQYc0O5k>. These reports, however, are refuted by direct and unqualified factual assertions of the President of Checks and Balances, a person with knowledge of relevant facts, in a sworn declaration submitted under penalty of perjury.

1 justification expressly address whether the regulation also exempts production costs that are
2 incurred unrelated to the advertisement's dissemination over the internet. *See generally*
3 Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

4 Nonetheless, the Commission addressed the reach of the internet exception in
5 Advisory Opinion 2008-10 (VoterVoter.com). There, the Commission stated without further
6 analysis that "[t]he costs incurred by an individual in creating an ad will be covered by the
7 Internet exemption from the definition of 'expenditure' so long as the creator is not also
8 purchasing TV airtime for the ad he or she created." Advisory Op. 2008-10 at 7; *see also id.*
9 at 8 n.12 (stating that, "[f]or purposes of reporting under 11 C.F.R. 109.10, the creation costs
10 would not become reportable independent expenditures until the ad is publicly distributed or
11 otherwise publicly disseminated"). Given the Commission's conclusion in AO 2008-10 that
12 the cost of "creating" an internet communication falls within the scope of the exemption —
13 which necessarily would include creation costs associated with production elements unrelated
14 to internet dissemination itself — and accepting as true the sworn statement of the
15 Respondent that the communication at issue here appeared solely on the internet, it appears
16 that the internet exemption would apply to any production costs associated with Respondent's
17 videos. Thus, any production costs the Respondent may have incurred would not constitute
18 contributions or expenditures and, accordingly, would not give rise to an obligation to report
19 those costs as independent expenditures.

20 Moreover, even if the internet exemption did not reach non-internet-related production
21 costs, we nonetheless conclude that the Respondent here was not required to report such costs
22 associated with the challenged advertisements as independent expenditures, because the

1 advertisements at issue do not expressly advocate the election or defeat of a clearly identified
2 federal candidate.³ Consequently, the advertisements are not independent expenditures.

3 The term "independent expenditure" means an expenditure by a person for a
4 communication that "expressly advocates" the election or defeat of a clearly identified
5 candidate that is not made in cooperation, consultation, or concert with, or at the request or
6 suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political
7 party committee or its agents. 11 C.F.R. § 100.16.⁴

8 A communication "expressly advocates" the election or defeat of a clearly identified
9 candidate when, among other things, it contains campaign slogans or individual words that "in
10 context can have no other reasonable meaning than to urge the election or defeat of one or
11 more clearly identified candidate(s) such as posters or bumper stickers which say 'Nixon's the
12 One,' 'Carter '76,' 'Reagan/Bush,' or 'Mondale!'" See *id.* § 100.22(a); *Buckley v. Valeo*, 424
13 U.S. 1, 44 n.52 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249
14 (1986). In addition, a communication contains express advocacy if, when taken as a whole
15 and with limited reference to external events, it "could only be interpreted by a reasonable
16 person as containing advocacy of the election or defeat of one or more clearly identified
17 candidate(s)" because it contains an "electoral portion" that is "unmistakable, unambiguous,
18 and suggestive only of one meaning" and "reasonable minds could not differ as to whether it
19 encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages

³ The nature and content of the advertisements reasonably suggest the Respondent may have incurred a reportable amount of costs associated with their production not related to disseminating the advertisements on the internet.

⁴ Every person who makes independent expenditures in excess of \$250 during a calendar year must file a report that discloses information about its expenditures. 2 U.S.C. § 434(c). In addition, every person that makes or contracts to make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours before the date of an election must file a report describing the expenditures within 24 hours, and if the costs associated with independent expenditures aggregate \$10,000 or more at any time up to and including the 20th day before an election, such persons must file a report with the Commission describing the expenditures within 48 hours. *Id.* § 434(g)(1)-(2).

1 some other kind of action.” 11 C.F.R. § 100.22(b); *see also* Explanation and Justification, 60
2 Fed. Reg. 35,292, 35,295 (July 6, 1995) (“[C]ommunications discussing or commenting on a
3 candidate’s character, qualifications or accomplishments are considered express advocacy
4 under new section 100.22(b) if, in context, they have no other reasonable meaning than to
5 encourage actions to elect or defeat the candidate in question.”).

6 We conclude that neither of the two advertisements that are the focus of the Complaint
7 appears to contain express advocacy. The advertisement entitled, “Why Would You Lie,”
8 contests allegations it claims were made by President Obama and others that coal miners were
9 required by their employer to attend a Romney campaign rally. While a narrative voice-over
10 states “[i]n a letter, the miners make it clear no one was forced to attend the rally, no
11 attendance records were taken, and there were no penalties for not attending,” the video
12 briefly displays background footage of coal miners at a campaign rally for Mitt Romney.
13 In that scene, Romney stands behind a podium that bears a sign displaying his and his vice-
14 presidential nominee’s names. The paired candidate names appear beneath the statement,
15 “Coal Country Stands with Mitt.”

16 Arguably, the pairing of candidate names on the podium in that shot is similar in style
17 to “Reagan/Bush,” which 11 C.F.R. § 100.22(a) specifically enumerates as a type of
18 “campaign slogan or individual words” that could constitute express advocacy, if the context
19 in which it is used gives rise to no other reasonable meaning than to urge the election or
20 defeat of a candidate. Nothing else in the advertisement, however, references the pending
21 election or exhorts the viewer to vote in any manner. Nor is the sign a prominent component
22 of the advertisement itself; it appears as part of footage of a prior event and only then for
23 about five seconds. Further, in light of the public dispute over whether miners attended the
24 prior Romney campaign event voluntarily, and the focus of the advertisement on that dispute,

1 one reasonably might conclude that the message on the sign — “Coal Country Stands with
2 Mitt” — is to show that the miners voluntarily appeared in support of “Romney / Ryan” at the
3 event. Given the context in which the podium placard appears in the advertisement and the
4 ambiguity of its message, we conclude that “Why Would You Lie” does not constitute
5 express advocacy as defined in 11 C.F.R. § 100.22(a) or (b).

6 The “War On Coal” advertisement also does not appear to contain express advocacy.
7 It contains no statement similar to any of the enumerated phrases, campaign slogans, or
8 individual words set forth in Section 100.22(a). Nonetheless, it does contain statements that
9 relate to “a candidate’s character, qualifications, or accomplishments,” all relevant under
10 Section 100.22(b). Specifically, it contends that then-candidate “Sherrod Brown is lying” and
11 that Sen. Brown and then-candidate President Obama “are job killers.” These assertions,
12 combined with the highlighted word “STOP” above the phrase “the War on Coal,” could be
13 construed together to advocate “stopping” Senator Brown and President Obama through their
14 electoral defeat.

15 Although that interpretation is not unreasonable, it is not the *only* reasonable
16 construction of the advertisement. In exhorting viewers to stop the war on coal, the
17 advertisement could reasonably be interpreted to encourage action to influence relevant
18 legislation or other non-election-related congressional activity. *See* Factual and Legal
19 Analysis at 7-8, MUR 6122 (National Assoc. of Home Builders) (no express advocacy where
20 mailer that described candidate as “fighting for working families” and asked recipients to
21 thank him for positions and votes he had taken in the past could reasonably be viewed as
22 praising candidate’s positions and encouraging him to maintain those positions in the future,
23 and not as encouraging the reader to vote for or against candidate in upcoming election);
24 Factual and Legal Analysis at 6, MUR 5854 (Lantern Project) (ads criticizing Senator’s votes

1 on particular issues were not express advocacy because they could reasonably be viewed as
2 expressing the sponsoring organization's view on that issue). Moreover, the advertisement
3 contains no electoral portion, let alone an "unmistakable, unambiguous" one. See 11 C.F.R.
4 § 100.22(b)(1). The advertisement therefore does not contain express advocacy.
5 Accordingly, because neither advertisement contains express advocacy, Checks and Balances
6 was not required to report either advertisement as an independent expenditure.

7 Similarly, Checks and Balances was not required to include a disclaimer in either
8 advertisement. We agree that communications distributed on the internet require no
9 disclaimer. As to persons other than political committees, disclaimers are only required on
10 electioneering communications and public communications that contain express advocacy.
11 See 11 C.F.R. § 110.11(a)(2) and (4). As discussed above, the advertisements were not
12 electioneering communications. Moreover, the definition of "public communication"
13 excludes "communications over the Internet, except for communications placed *for a fee* on
14 another person's Web site." 11 C.F.R. § 100.26 (emphasis added). We have no facts that
15 indicate Checks and Balances placed the advertisements on the website for a fee.
16 The advertisements therefore did not require disclaimers.

17 For the foregoing reasons, we recommend that the Commission find no reason to
18 believe that Checks and Balances violated 2 U.S.C. §§ 434(f)(1) and 441d(d)(2).⁵

⁵ Additionally, there is no basis to recommend reason to believe that Checks and Balances violated the Act as to the third advertisement, which it references in its response to explain the invoices provided in the Complaint. Although the invoices indicate that the advertisement ran in the electioneering communications window, we do not have information necessary to support an inference that the advertisement refers to a clearly identified candidate for Federal office. See 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29(a).

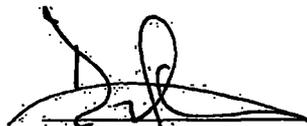
In so concluding, we afford no weight to Perrin's declaration that the third advertisement "would not trigger reporting or an audio statement or written disclaimer." Resp. at 2; Perrin Decl. ¶ 4. Neither the Response nor declaration identifies a factual basis supporting that purely legal conclusion. The assertion therefore lacks probative force. *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.3d 118, 121 (6th Cir. 1981) (giving no weight to legal conclusions in affidavit because "[t]he affidavit is no place for ultimate facts and conclusions of law") (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.22(1), at 56-1316 (Supp. 1979)); *Schubert v. Nissan Motor Corp. in USA*, 148 F.3d 25, 30 (1st Cir. 1998); 2A C.J.S. AFFIDAVITS § 39 ("It is improper for

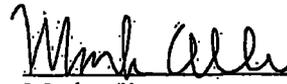
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IV. RECOMMENDATIONS

1. Find no reason to believe that Checks and Balances for Economic Growth violated 2 U.S.C. §§ 434(f)(1), 441d(d)(2).
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.

Aug. 6, 2014
Date


Daniel A. Petalas
Associate General Counsel
for Enforcement


Mark Allen
Acting Assistant General Counsel


Tracey L. Ligon
Attorney

affidavits to embody legal arguments, and legal arguments and summations in affidavits will be disregarded by the courts.”).